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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

DOCKET NO. 540

HUNILDA BALBAS GARDINER,

Petitioner,

*against*

UNITED STATES OF AMERICA,

Respondent.

## PETITIONER'S REPLY BRIEF

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1. The Government's argument that "petitioner is in no position to complain that the trial court abused its discretion in refusing to grant relief from joinder on a ground never asserted to that court" (p. 5) does not square with the mandate of this Court that "the trial judge is under a continuing duty at all stages of the trial to grant severance if prejudice does appear." *Schaffer* v. *United States*, 362 U. S. 511, 514.

2. Contrary to the statement contained in the Government's brief (p. 5) petitioner does not concede that "the fact that one defendant may be deprived of the testimony of a co-defendant is not sufficient reason in itself to grant separate trials." The petitioner recognizes, as does the Government, that cases decided by the Circuit Court and District Courts have so held, and that this Court has never passed upon the question.

3. It is because the Government could not compel petitioner's husband to take the stand that the trial of petitioner with her husband violated her constitutional rights. If she were tried separately, she would have had the benefit of her husband's testimony.

4. We agree that "a determination of prejudice within the meaning of Rule 14 requires a sensitive evaluation of the facts and of the respective needs of the government and the accused" (Govt. Br., p. 5). We submit that the trial judge was not sensitive to the fact that because petitioner and her husband were tried jointly she was deprived of the benefit of his testimony. Hence his failure to sever her trial was clearly erroneous.

## CONCLUSION

**We respectfully submit that for the reasons set forth in the petition and above that the petition for a writ of certiorari should be granted.**

Respectfully submitted,

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Dated: November 14, 1963.